

Sources of human rights obligations binding the UN Security Council

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Introduction

Since the collapse of the Soviet Union and the end of the Cold War, the Security Council of the United Nations has intensified its work in a way unimaginable in the long period of bipolar stalemate that had begun only a few years after the founding of the United Nations and lasted for some forty years. Lifted up by a wave of post-Cold War enthusiasm, the Council both greatly increased its efforts in its 'traditional' area of responsibility – the maintenance of inter-state peace and security – and expanded its mandate to new fields and issues, among them the fight against global terrorism, democratisation and the protection of human rights.¹ In the meantime, the enthusiasm of the 1990s with its perhaps exaggerated hopes subsided, but the new powers claimed by the Council in the last fifteen years have not been called into question. On the contrary, and somewhat astonishingly, these powers have been generally accepted by the members of the international community, and are awaiting new situations in which the Council will use them.²

As a consequence of the sharply growing activities of the Council, a discussion has arisen regarding the scope, and possible sources, of the

¹ For a very good overview, see D. M. Malone (ed.), *The UN Security Council. From the Cold War to the 21st Century* (Boulder, CO and London: Lynne Rienner, 2004).

² See, e.g., E. de Wet, 'The Governance of Kosovo. Security Council Resolution 1244 and the Establishment and Functioning of EULEX', *AJIL*, 103 (2009), 83–96, 87: 'By now the Security Council is widely acknowledged to have the power to establish a civil administration under the auspices of the United Nations on the basis of its implied powers under Chapter VII of the Charter ... Second, the Security Council also has the power under Chapter VII of the Charter to authorize individual States to implement a civil administration ... Furthermore, the Charter enables the Security Council to authorize regional organizations to administer a territory.'

Council's international legal obligations. Is the Council, when discharging its responsibility under the UN Charter, bound by rules of international law, and if so, by which rules exactly? In particular, the issue of the Council's human rights commitments has attracted a great deal of interest. While intuitively most people – and certainly most lawyers – agree that the Council is obliged to observe international rules concerning the protection of human rights, it is not so easy to substantiate this belief on the basis of positive international law.

When the UN Charter was drafted, human rights were at the international level still merely moral postulates and political principles. But even if the founders of the United Nations could have made, through respective Charter provisions, human rights directly binding on the Organisation as a whole or on particular organs, they did not find it necessary. As regards the Security Council, they apparently never entertained the thought that action taken by the Council under Chapter VII of the Charter could violate the human rights of individuals. On the contrary, they believed that the maintenance and – if necessary – restoration of international peace and security entrusted to the Council directly served the 'four essential human freedoms' proclaimed by President Franklin D. Roosevelt in 1941.³ Accordingly, international peace ('to save succeeding generations from the scourge of war') and the protection of fundamental human rights appear together right at the beginning of the preamble of the UN Charter among the principal aims of the peoples of the United Nations, without the slightest hint of a possible conflict.

In more general terms, one can say that the founders did not expect the United Nations to exercise power or authority in a way that would directly affect rights and freedoms of individual persons. But in the meantime, 'the screen which originally separated the United Nations

³ See F.D. Roosevelt, Address to Congress, 6 January 1941 ('Four Freedoms Speech'), reprinted in R. Hofstadter and B.K. Hofstadter (eds.), *Great Issues in American History. From Reconstruction to the Present Day, 1864–1981* (New York: Vintage Books, 1982), 386–91. The four freedoms proclaimed by the US President were the freedom of speech and expression, the 'freedom of every person to worship God in his own way', the 'freedom from want' and the 'freedom from fear'. See also the Atlantic Charter of 14 August 1941, *ibid.*, 399–401, in which the President and British Prime Minister Winston Churchill announced, *inter alia*, that 'after the final destruction of the Nazi tyranny, they hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want'.

from the man and the woman on the street progressively disappeared'.⁴ Increasingly, the United Nations has been entrusted with tasks of global governance that go beyond its traditional purposes and functions.⁵ A number of developments, in particular in the context of peacekeeping operations and the international interim administration of territories (such as East Timor and Kosovo), have made it a possibility that violations of human rights and international humanitarian law that are attributable to the United Nations may occur.⁶ Accordingly, 'the temporary exercise of governmental or quasi-governmental authority by an international organisation over private persons and enterprises ... give[s] rise to claims that the acts performed by the organisation under that authority are illegal'.⁷

In the case of Chapter VII sanctions of the Security Council targeting individuals and private 'entities',⁸ those sanctions do have a direct impact on the rights and freedoms of individuals. In the first place, the existing 'targeted sanctions' affect the right to property, which is protected by regional human rights treaties and today possibly also by customary international law, the freedom of movement and the freedom of association. Sanctions may also affect the right to respect for family and private life and the right to seek and to enjoy in other countries asylum from persecution. Further, the right to reputation is affected, which is a (civil) right within the meaning of Art. 14(1) of the International Covenant on Civil and Political Rights (ICCPR) and

⁴ See C. Tomuschat, *Human Rights. Between Idealism and Realism*, 2nd edn. (Oxford University Press, 2008), p. 101.

⁵ A. Reinisch, 'Governance Without Accountability?', *GYIL*, 44 (2001), 270–306, 270, identifies 'a global trend of shifting governance tasks from States (including their sub-entities) to non-State actors', i.e. private entities, on the one hand, and international or supranational entities, on the other hand.

⁶ See, e.g., F. Mégret and F. Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities', *Human Rights Quarterly*, 25 (2003), 314–42, 325 *et seq.*

⁷ See K. Wellens, *Remedies against International Organisations* (Cambridge University Press, 2002), p. 89.

⁸ Of the various sanctions regimes, the one established against individuals and entities belonging to, or associated with, Al Qaeda and/or the Taliban (Security Council resolution 1267 of 15 October 1999 and following resolutions) has gained particular importance because of the relatively large number of individuals and entities listed. This sanctions regime also differs from the others in that, after the Taliban were removed from power in Afghanistan, there has been no special link between the targeted individuals and entities and a specific country. For an overview of the work and procedure of the 1267 Committee of the Security Council, see E. Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al Qaida/Taliban Sanctions', *AJIL*, 98 (2004), 745–63.

Art. 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

It is true that it is still the Member States which must implement the resolutions of the Council by first enacting rules in accordance with the requirements of their domestic (constitutional) law, and then enforcing those rules by imposing specific measures upon the individuals and entities concerned. As a matter of principle, Security Council resolutions are not self-executing in the domestic legal order of most Member States, and the United Nations does not have at its disposal its own means and mechanisms of enforcement. However, Member States do not possess any discretionary rights – i.e. rights to decide or act according to their own judgment or choice – with regard to the implementation of sanctions determined by the Security Council under Chapter VII of the UN Charter. Instead, they must comply with the terms of the Council resolutions as they stand.⁹ In particular, Member States have no authority to review the names of individuals and entities specified by the responsible committee of the Security Council, with the aim of ascertaining whether the persons and entities indeed fall under the categories defined by the respective Council resolution. The obligations of Member States under the UN Charter prevail over any obligation arising from other international agreements or customary international law (Art. 103 of the UN Charter), and in its relationship to the United Nations a Member State may not invoke the provisions of its internal law, including its constitutional law, as a justification for its failure to implement a binding resolution of the Security Council.

In this chapter, I wish to examine the various possible sources of human rights obligations of the Security Council – i.e. treaty and customary

⁹ Thus, the EU Council and EC Commission in the *Yusuf* and *Kadi* cases correctly described the law, the Court of First Instance (CFI) agreeing: ‘As their principal argument, the Council and the Commission, referring in particular to Articles 24(1), 25, 41, 48 (2) and 103 of the Charter of the United Nations, submit, first, that the Community, like the Member States of the United Nations, is bound by international law to give effect, within its spheres of competence, to resolutions of the Security Council, especially those adopted under Chapter VII of the Charter of the United Nations; second, that the powers of the Community institutions in this area are limited and that they have no autonomous discretion in any form; third, that they cannot therefore alter the content of those resolutions or set up mechanisms capable of giving rise to any alteration in their content and, fourth, that any other international agreement or domestic rule of law liable to hinder such implementation must be disregarded.’ See Judgments of the Court of First Instance of 21 September 2005, Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the EU and Commission of the EC* [2005] ECR II-3533, para. 206, and Case T-315/01 *Yassin Abdullah Kadi v. Council of the EU and Commission of the EC* [2005] ECR II-3649, para. 153.

international law (including *jus cogens*), general principles of law, constitutional values and traditions common to UN Member States, and the UN Charter. I conclude that the principal source of human rights obligations of the Council is the Charter as the Constitution of the United Nations.

Human rights treaty law

After the Second World War, the proclamation of the Universal Declaration of Human Rights by the UN General Assembly on 10 December 1948¹⁰ set in motion a process of codifying and developing human rights by international treaty-making which is still going on. On a global level, a lasting success was achieved with the adoption of the two international human rights covenants in 1966. Accordingly, one almost naturally turns first to human rights treaty law when trying to identify human rights standards by which the Security Council might possibly be bound.

However, the United Nations, as an international organisation and a subject of international law,¹¹ is not a party to any of the universal or regional treaties and conventions for the protection of human rights and fundamental freedoms. Accordingly, the United Nations is not directly bound by the respective provisions. The treaties and conventions were drafted only with a view to the performance of States, not of other subjects of international law. For instance, in Art. 2(1) ICCPR it is stated that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant'. According to Art. 1 ECHR, '[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'.

The United Nations also could not become a party to the treaties and conventions in question as they stand today, because they are only open to accession by States (see, e.g., Art. 48 ICCPR, Art. 59 ECHR, Art. 74 of the American Convention on Human Rights).

The reason for this restrictive approach of human rights treaties in defining the respective duty-bearers is that traditionally States (i.e. their governmental, administrative, legislative and judicial organs) have been

¹⁰ UN General Assembly res. 217 A (III), *United Nations Year Book* (1948–9), 535.

¹¹ See *Reparation for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisory Opinion, 1949 ICJ 174, 179.

regarded as the main potential violators of human rights. '[The] "international" protection of human rights denotes an ensemble of procedures and mechanisms which ... are primarily designed to protect human beings against their own State. Protection is generally needed at home. Human rights have been brought into being as a supplementary line of defence in case national systems should prove to be of no avail. Although the State is on the one hand reckoned with as the indispensable guarantor of human rights, historical experience has also made clear that the State ... may use the sovereign powers at its disposal to commit violations of human rights.'¹² As regards, in particular, the United Nations, it is certainly true that 'until recently, the UN had never thought of itself as actually capable of violating human rights'.¹³ Accordingly, the UN Charter requires the United Nations to 'promot[e] and encourag[e] respect for human rights' (Art. 1(3)), and to 'assist' Member States 'in the realization of human rights' (Art. 13(1b)).

It does not follow from the fact alone that UN Member States, or even an overwhelming majority of Member States, ratified certain human rights instruments that a corresponding obligation of the Organisation has come into existence.¹⁴ The concept of international person, or subject of international law, is based on a distinction between particular subjects and their particular rights, duties, or powers.¹⁵ As the International Court of Justice (ICJ) has held, '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community'.¹⁶ Accordingly, the rights and duties of intergovernmental organisations, as autonomous subjects of international law, on the one hand, and of their Member States, on the other hand, must be distinguished.¹⁷ In its advisory opinion in response to a

¹² See Tomuschat, *Human Rights*, *supra* n. 4, 97.

¹³ See Mégret and Hoffmann, 'The UN as a Human Rights Violator?', *supra* n. 6, 314.

¹⁴ But see A. Reinisch, 'Securing the Accountability of International Organizations', *Global Governance*, 7 (2001), 131–49, 137 *et seq.* and 141–3, arguing that the UN is bound 'transitively' by international human rights standards as a result and to the extent that its members are bound ('functional treaty succession by international organizations to the position of their Member States').

¹⁵ See R. Y. Jennings and A. D. Watts (eds.), *Oppenheim's International Law*, 9th edn., 2 vols. (London and New York: Longman, 1992), vol. I, part 1, 119 *et seq.*; H. G. Schermers and N. M. Blokker, *International Institutional Law*, 3rd edn. (The Hague: Martinus Nijhoff, 1995), 976 *et seq.*

¹⁶ *Reparation for Injuries* case, *supra* n. 11, 178.

¹⁷ See, in general, N. Blokker, 'International Organizations and Their Members', *International Organizations Law Review*, 1 (2004), 139–61, 152 *et seq.*

request by the World Health Organization (WHO), the ICJ explained in 1996 that it is the object of constituent instruments of international organisations 'to create new subjects of law endowed with a certain autonomy'.¹⁸ With regard to the United Nations, the Court had already stated in 1949 that 'the Organization . . . occupies a position in certain respects in detachment from its Members'.¹⁹ The Court also ruled that 'international organizations are subjects of international law and, as such, are bound by any obligations *incumbent upon them* under general rules of international law, under *their constitutions* or under international agreements to which *they are parties*'.²⁰

But this traditional picture has been modified by the emergence of 'supranational' organisations such as the European Community (EC). The EC has recognised both human rights treaty obligations of EC Member States as well as 'constitutional traditions common to the Member States' as sources of Community law from which direct obligations of the EC itself arise. The Community thus has developed a legal technique through which the constitutional traditions and international obligations of Member States are integrated into the legal order of the organisation itself. Notwithstanding the special character of the EC which – first supplemented and then increasingly absorbed by the European Union (EU) – is approaching a federal State-like existence, there is reason to expect that the law of other international organisations, including the United Nations, will be influenced by the European example as they, too, begin to engage in 'supranational' law-making with a direct effect on individuals.

According to Art. 2 of the Treaty on European Union (TEU, or EU Treaty),²¹ the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. Art. 6(3) says that 'fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.²² By this provision, the terms of an

¹⁸ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, International Court of Justice, Advisory Opinion, 1996 ICJ 66, 75.

¹⁹ *Reparation for Injuries* case, *supra* n. 11, 179.

²⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, International Court of Justice, Advisory Opinion, 1980 ICJ 73, 89–90 (emphasis added).

²¹ See Treaty on European Union of 7 February 1992, as amended by the Treaty of Lisbon of 13 December 2007; Official Journal of the EU C 83, 30 March 2010.

²² Further, the 'Charter of Fundamental Rights of the European Union' of 7 December 2000 (as amended on 12 December 2007) was recognised as a binding part of EU law; see Art. 6(1) of the Treaty.

international agreement concluded by EU Member States with the purpose of securing 'to everyone in their jurisdiction' certain rights and freedoms (Art. 1 ECHR) were made binding on the EU itself. In addition, 'fundamental rights . . . as they result from the constitutional traditions common to the Member States' – i.e. rules belonging to the domestic legal order of Member States – were transferred to the level of the EU in the form of general principles of community law.

Art. 6(3) EU Treaty is an expression of the high degree of integration achieved between EC/EU law and national law, which is typical of the EU and as yet unparalleled in the law of other international organisations. Also, the recognition of common constitutional traditions as a source of EU law is based on the fact that the EU Member States share certain principles of legal and political order. A similar degree of cohesion was already expressed by the States agreeing to the ECHR in 1950. In the Convention's preamble, they described themselves as 'European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law'. Art. 4 of the Constitutive Act of the African Union of 2000 also mentions, among the principles in accordance with which the African Union shall function, 'respect for democratic principles, human rights, the rule of law and good governance', the 'promotion of social justice' and 'respect for the sanctity of human life' (Art. 4, lit. m, n and o).

Although the UN Charter includes similar statements of values, in particular in its preamble and Art. 1, for a long time the political divisions of the world prevented UN Member States from agreeing on their substance. However, since the antagonism of the former bloc systems has been overcome, more and more such agreement can be found, as is apparent from many resolutions of the General Assembly in regard to human rights, democracy, the rule of law and good governance. Thus, there is an increasingly broader basis for referring to the constitutional traditions and values common to the Member States of the United Nations as a source of UN law. Compared to the state of EC/EU law, these are only cautious beginnings. But it is a development with a significant growth potential, as today the bold proclamation of the Universal Declaration of Human Rights that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' (preamble, para. 1) really has been universally accepted.

As UN law stands today, the organs of the United Nations are already prevented from simply ignoring either the constitutional traditions and

values common to Member States in the field of human rights or the human rights treaty obligations shared by an overwhelming majority of Member States. To put it differently, such traditions, values and treaty obligations must already be taken into account by UN organs when they exercise functions *vis-à-vis* individual persons. Following the wording of Art. 6(3) EU Treaty, it is therefore possible to say that, as a matter of principle, the United Nations shall respect fundamental rights, as guaranteed by the universal human rights treaties, and as they result from the constitutional traditions common to the Member States, as general principles of UN law.

Customary international law and general principles of law

There is today broad agreement among governments and international lawyers that many of the rules enunciated in the Universal Declaration of Human Rights have crystallised as customary international law, in particular the right to life, the prohibition of torture (as the reverse side of a right to physical integrity), the protection of personal freedom and the prohibition of discrimination on racial grounds.²³

It has been argued that the respective customary obligations are also binding on international organisations, as subjects of international law, to the extent that the organisations engage in activities which are likely to affect the mentioned rights of individuals.²⁴ However, as was noted before, international human rights law was primarily designed to protect human beings against their own State. In general, it was not considered necessary to secure protection against acts of 'governmental' power with a direct impact on individuals issued by organs of international organisations, as there virtually were no such acts. Accordingly, there was little room for the development of rules of customary international law concerning the obligation of international organisations to comply with particular human rights standards. By way of example, due process rights may be mentioned.²⁵ The right to a fair and public hearing by an independent and impartial tribunal (Art. 10 of the Universal Declaration) and other due process rights may today be a part of customary international law, as far as States are the addressees of those

²³ See Tomuschat, *Human Rights*, *supra* n. 4, 37–8, with further references.

²⁴ See Reinisch, 'Governance', *supra* n. 5, 281 *et seq.*, with further references.

²⁵ I have dealt with this issue in great detail in a study commissioned in 2005 by the Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations. See B. Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-Up Action by the United Nations', *International Organizations Law Review*, 3 (2006), 437–85.

obligations.²⁶ But because of a lack of relevant practice and *opinio juris*, the same cannot presently be said for international organisations in general, or the United Nations in particular.²⁷

In the *Yusuf* case, the Court of First Instance of the European Communities held in 2005 that ‘the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council . . . with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible’.²⁸ The Court further said ‘that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of *jus cogens*. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the [European] Community’.²⁹

While the Court rightly concluded that the human rights protected by *jus cogens* rules must be observed by the Security Council, the Court’s reasoning does not appear to be correct. Due to the lack of a relevant practice and *opinio juris*, peremptory norms of international law (which constitute a sub-category of customary international law) as such are no more binding on the United Nations, or the Security Council, than is customary human rights law. Rather, the respective obligations of the Council follow from the UN Charter, and they extend way beyond human rights specifically covered by *jus cogens* to all human rights recognised as part of the ‘international bill of rights’.³⁰

Nevertheless, a trend can be perceived widening the scope of customary international law to include direct ‘governmental’ action of international organisations *vis-à-vis* individuals. To this development, the law of the EC/EU has strongly contributed. As is well known, the EU has been

²⁶ Certain due process rights, like the right to be heard, may also belong to *jus cogens* – i.e. rules from which no derogation is permitted – because they are ‘core rights directly related to human existence’ (for this expression, see Tomuschat, *Human Rights*, *supra* n. 4, 38).

²⁷ See Reinisch, ‘Governance’, *supra* n. 5, 282–6, concluding that ‘[t]he problem of redress mechanisms in case of unlawful UN action remains an unsolved one’.

²⁸ Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR-II-3533, Judgment of the Court of First Instance, 21 September 2005, para. 277.

²⁹ *Ibid.*, para. 281.

³⁰ See *infra*, ‘The UN Charter as the principal source of UN human rights obligations’.

endowed with far-reaching powers over the whole breadth of the tasks it is mandated to perform.³¹ According to Art. 288 TFEU, the Union can make regulations, issue directives and take decisions. All of these acts produce binding effects for their individual addressees. Consequently, a system of judicial protection against EU acts was established which is by and large equivalent to the protection offered in EU Member States at a national level. A person who is of the opinion that her rights have been breached by an act of Union power can either challenge that act directly by instituting proceedings before the Court of Justice of the European Communities (ECJ) (Art. 263(4) TFEU), or can contest national acts taken on the basis of European legislation before national tribunals which must then, under certain conditions, refer the case to the ECJ.

Since the direct effect of EU law is still a unique feature unparalleled in the law of other international organisations, in particular universal organisations, it is currently not possible to deduce general rules of customary international law from the law and practice of the EC/EU alone. But considering the degree to which the EC/EU has been a model for other regional international organisations, particularly in Latin America and in Africa, it is justified to say that EC/EU law can be regarded as a precedent which in the future will serve as a guide or pattern in analogous cases of direct 'governmental' action taken by international organisations *vis-à-vis* individuals.

To the extent that certain human rights standards are concurrently recognised in the domestic (constitutional) law of a great number of States of all regions of the world, they have become rules of international law in the form of general principles of law as meant in Art. 38(1)(c) ICJ Statute. Although the standards in question describe obligations of governments *vis-à-vis* their citizens (and foreigners under their jurisdiction) in the sphere of domestic law, the general principles of international law which have arisen on the basis of those widely recognised standards are also applicable to international organisations as subjects of international law when those organisations exercise 'governmental' authority over individuals.³² However, if the constituent treaty of an international organisation provides for specific rules, these rules prevail in accordance with the concept

³¹ For this and the following, see Tomuschat, *Human Rights*, *supra* n. 4, 98.

³² See D. Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press, 2005), 16: 'A domestic public or administrative law principle is arguably only applicable to the exercise by an international organization of governmental power where this principle can be identified as applying to the particular power within the domestic public and administrative law systems of a number of member

of *lex specialis derogat legi generali*.³³ If possible, an effort must be made to interpret the rules of the constituent treaty in accordance with the substance of the respective general principles of international law.

The idea of estoppel

Already in Roman law it was established that no one is allowed to act contrary to his or her prior action or behaviour: *venire contra factum proprium (nemini licet)*.³⁴ Otherwise, she loses the protection of the law. In other words, by adopting a certain position, attitude, or course of conduct one raises certain expectations, and not living up to those expectations may lead to negative legal consequences. The maxim is a general principle of law as defined by Art. 38(1)(c) ICJ Statute. In international law, the 'legal technique whereby States deemed to have consented to a state of affairs cannot afterwards alter their position' is often referred to as estoppel.³⁵

In accordance with that concept, it may be said that the development of international human rights law since 1945, to which the work of the United Nations has decisively contributed, has given grounds for legitimate expectations that the United Nations itself, when its action has a direct impact on the rights and freedoms of an individual, strictly observes human rights and fundamental freedoms.³⁶ As Judge Simma has remarked, 'wherever the future of its human rights work may lead to,

States, since only then can it be considered as a general principle of law and thus a formal source of law applicable to international organizations.' For the applicability of general principles of law in the law of international organisations, see generally Schermers and Blokker, *International Institutional Law*, *supra* n. 15, 984 *et seq.*

³³ See also C. Tomuschat, 'International Law. Ensuring the Survival of Mankind on the Eve of a New Century', *RdC*, 281 (1999), 9–438, 335: 'They [the general principles of law] provide a residual framework of general precepts for instances where treaty and custom are silent on how to resolve a specific legal issue.'

³⁴ See D. Liebs, *Lateinische Rechtsregeln und Rechtssprichwörter*, 3rd edn. (Munich: C. H. Beck, 1983), 216. In another version, the rule reads *Nemo contra factum suum venire potest* (No man can contravene or contradict his own deed). See *Black's Law Dictionary*, 6th edn. (St. Paul, MN: West Publishing, 1990), 1037.

³⁵ See M. N. Shaw, *International Law*, 5th edn. (Cambridge University Press, 2003), 439. For the relationship between the maxim *Venire contra factum proprium* and the concept of estoppel, see R. Kolb, *La bonne foi en droit international public. Contribution à l'étude des principes généraux de droit* (Paris: Presses Universitaires de France, 2000), 357 *et seq.*

³⁶ See also A. Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions', *AJIL*, 95 (2001), 851–72, 869: 'When the United Nations – the major promoter of human rights in the international arena – takes enforcement action, it can be legitimately held to show respect for human rights in an exemplary fashion.'

the further realization of the promise of the United Nations Charter to promote and encourage respect for human rights for all will be one of the decisive tests of the legitimacy of the world organization'.³⁷ The United Nations would contradict itself if, on the one hand, it constantly admonished its Member States to respect human rights and, on the other hand, it refused to respect the same rights when relevant to its own action. As another author has pointed out, 'it is self-evident that the Organization is obliged to pursue and try to realize its own purpose'.³⁸

To a considerable extent, today's international human rights law is a result of the constant endeavours of the United Nations which began with the adoption of the UN Charter and the Universal Declaration of Human Rights.³⁹ In the preamble of the Charter, human rights appear right after the prevention of war among the principal goals of the United Nations. As Hannum has noted, 'in perhaps no other area has the United Nations been so prolific or, some would argue, so successful as it has been in the adoption of new international norms for the protection of human rights'.⁴⁰ When establishing the Human Rights Council, the UN General Assembly acknowledged once more 'that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being'.⁴¹ In its declaration on the sixtieth anniversary of the Universal Declaration of Human Rights, the General Assembly observed that 'we all have the duty to step up our efforts to promote and protect all human rights and to prevent, stop and redress all human rights violations'.⁴² This 'we all' includes action taken by the Member States through the organs of the Organisation.

This finding is also in line with essential notions of the concept of international personality. As the ICJ has ruled, 'the rights *and* duties of

³⁷ See B. Simma, 'Human Rights' in C. Tomuschat (ed.), *The United Nations at Age Fifty. A Legal Perspective* (The Hague, London and Boston: Kluwer Law International, 1995), 263–80, 280.

³⁸ See Z. Stavrinides, 'Human Rights Obligations under the United Nations Charter', *International Journal of Human Rights*, 3 (1999), 38–48, 40. See also Mégret and Hoffmann, 'The UN as a Human Rights Violator?', *supra* n. 6, 317 *et seq.*

³⁹ Of the extensive literature, I mention only P. Alston (ed.), *The United Nations and Human Rights* (Oxford: Clarendon Press, 1992); T. J. Farer and F. Gaer, 'The UN and Human Rights. At the End of the Beginning' in A. Roberts and B. Kingsbury (eds.), *United Nations, Divided World. The UN's Roles in International Relations*, 2nd edn. (Oxford: Clarendon Press, 1993), 240–96; H. Hannum, 'Human Rights' in O. Schachter and C. C. Joyner (eds.), *United Nations Legal Order*, 2 vols. (Cambridge University Press, 1995), vol. 1, 319–48; and B. Simma, 'Human Rights', *supra* n. 37.

⁴⁰ See Hannum, 'Human Rights', *supra* n. 39, 319.

⁴¹ See General Assembly res. 60/251 of 15 March 2006, preambular para. 6.

⁴² See General Assembly res. 63/116 of 10 December 2008, para. 5.

an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice'.⁴³ The application of the doctrine of implied powers in the law of international organisations must lead to a recognition not only of implied rights but also of implied duties or obligations. This means that if the recognised practice of an organisation develops in such a way that it includes an exercise of direct authority over individuals, a corresponding duty of that organisation to observe human rights arises under international law.

It may be added here that, foresightedly, the drafters of the 1948 Universal Declaration of Human Rights anticipated that the respect for and observance of human rights and fundamental freedoms called for by the Declaration would not only be demanded from States but also from other bodies and institutions exercising 'elements of governmental authority',⁴⁴ including international organisations.

The language of the Universal Declaration is indeed broad enough to cover also official acts of international organisations, such as the United Nations. For instance, the preamble of the Declaration states that 'human rights should be protected by the rule of law', and that the Declaration represents 'a common standard of achievement for all peoples and all nations' to be kept in mind by 'every individual and every organ of society'. By 'progressive measures, national and international', the 'universal and effective recognition and observance' of human rights and freedoms shall be secured. According to Art. 2 of the Declaration, 'everyone is entitled to all the rights and freedoms set forth in this Declaration', and 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty'. In Art. 28 it is declared that 'everyone is entitled to a social *and international order* in which the rights and freedoms set forth in this Declaration can be fully realized'.⁴⁵ Further, the individual rights proclaimed in the Declaration are formulated in a way to make it clear that every body or institution exercising governmental authority *vis-à-vis* individuals, or elements thereof, shall be bound by

⁴³ *Reparation for Injuries Case*, *supra* n. 11, 180 (emphasis added).

⁴⁴ This expression is taken from the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (Annex to UN General Assembly res. 56/83 of 12 December 2001), Arts. 5, 6, 7, 9.

⁴⁵ Emphasis added.

them. Arts. 3 and 6 of the Declaration, for instance, say that ‘everyone has the right to life, liberty and the security of person’ and ‘the right to recognition everywhere as a person before the law’.

The above reading of the Universal Declaration has been confirmed by many resolutions of the UN General Assembly, as well as the Vienna Declaration adopted by the World Conference on Human Rights on 25 June 1993.⁴⁶ The World Conference declared, *inter alia*, ‘that the promotion and protection of human rights is a matter of priority for the international community’. It further expressed the view that ‘the promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles’, and that ‘the promotion and protection of all human rights is a legitimate concern of the international community’ (para. 4). Para. 13 of the Vienna Declaration opens with the following statement: ‘There is a need for States *and international organizations*, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights.’⁴⁷

The UN Charter as the principal source of UN human rights obligations

Notwithstanding the growing legal importance, for the United Nations, of human rights treaty law, on the one hand, and constitutional values and traditions common to UN Member States, on the other hand, and a trend widening the scope of customary human rights law to include direct ‘governmental’ action of international organizations *vis-à-vis* individuals, the principal source of human rights obligations of the United Nations is the UN Charter as the Organisation’s constitution.⁴⁸ The

⁴⁶ UN Doc. A/CONF.157/23 of 12 July 1993. ⁴⁷ Emphasis added.

⁴⁸ For a recent summary of my work describing the UN Charter as a constitution, see B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden and Boston: Martinus Nijhoff, 2009). For other constitutional approaches in international law, see, in particular, R. St. J. Macdonald and D. M. Johnston (eds.), *Towards World Constitutionalism. Issues in the Legal Ordering of the World Community* (Leiden and Boston: Martinus Nijhoff, 2005); M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (Oxford University Press, 2007); and J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009). See further the special issue of the *Leiden Journal of International Law* (vol. 19 (2006), 3), with contributions by A. Peters, E. de Wet and E. U. Petersmann.

United Nations is an organisation based on the concept of the rule of law. The organs of the Organisation are bound to comply with the rules of the UN Charter, which has a dual constitutional function – it is both the Constitution of the United Nations as an organisation and the constitution of the international community ‘as a whole’.⁴⁹

In the preamble of the UN Charter, the peoples of the United Nations have declared their determination ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women’. Art. 1(3) of the Charter defines one of the purposes of the United Nations as ‘to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion’. According to Art. 1(4) of the Charter, the United Nations shall be ‘a centre for harmonizing the actions of nations in the attainment of these common ends’.⁵⁰

For the reasons set out above,⁵¹ the UN Charter of 1945 did not explicitly define the human rights obligations of the United Nations itself. But as a constitution, the UN Charter is a ‘living instrument’.⁵² Early after the San Francisco Conference, an eminent international lawyer, Professor J. L. Brierly of Oxford University, wrote about the Charter that ‘constitutions always have to be interpreted and applied, and in the process they are overlaid with precedents and conventions which change them after a time into something very different from what anyone, with only the original text before him, could possibly have foreseen’.⁵³ More recently, the United Nations was called ‘an entire system which is in constant movement, not unlike a national constitution whose original texture will be unavoidably modified by thick layers of political practice and jurisprudence’.⁵⁴ By way of example, one can mention as such changes caused by practice and new insight the Uniting for Peace resolution of 1950, the codification and development of Charter principles and rules by the General Assembly, the ‘invention’

⁴⁹ See Fassbender, *The United Nations Charter*, *supra* n. 48, 116.

⁵⁰ For further references of the UN Charter to human rights, see Arts. 13(1b), 55(c), 62(2), 76(c).

⁵¹ See *supra* text accompanying n. 3.

⁵² For this notion, originally developed by American legal realism, see Fassbender, *The United Nations Charter*, *supra* n. 48, 21, 130–1.

⁵³ See J. L. Brierly, ‘The Covenant and the Charter’, *BYBIL*, 23 (1946), 83–94.

⁵⁴ See C. Tomuschat, ‘Obligations Arising for States Without or Against Their Will’, *RdC*, 241 (1993), 195–374, 251 *et seq.*

of UN peacekeeping operations and the expansion of the concept of international peace and security in the practice of the Security Council.

Following the adoption of the Charter, human rights have become legal obligations of States under international treaty and customary law. This is essentially due to the incessant work of the organs of the United Nations, in particular the General Assembly and the Commission on Human Rights. The Universal Declaration of Human Rights, the Convention on the Prevention and Punishment of Genocide of 1948, the Convention on the Elimination of Racial Discrimination of 1965 and the two Human Rights Covenants of 1966 have become part of the constitutional foundation of the international community. In the preamble of the International Covenant on Civil and Political Rights (ICCPR), the States Parties to the Covenant declared, *inter alia*, that ‘*in accordance with the principles proclaimed in the Charter of the United Nations*, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world’.⁵⁵

As mentioned above, another process has led the United Nations to exercise governmental or quasi-governmental authority over private persons and enterprises – in particular, in the context of peacekeeping operations and the temporary administration of territories. Sanctions imposed by the Security Council also have a direct impact on the rights and freedoms of individuals.

In consequence of this dual progress – the coming into existence of a firmly recognised body of human rights in international law, promoted by the United Nations, and the expansion of functions of the Organisation into new areas resulting in acts with a direct impact on the rights of individuals – the references of the UN Charter to human rights have developed into rules embodying direct human rights obligations on the part of the organs of the Organisation. Today, the Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms of individuals to the greatest possible extent.⁵⁶ The United Nations cannot attain its purpose of achieving ‘international co-operation . . . in promoting and encouraging respect for human rights and fundamental freedoms for all’ (Art. 1(3) of the UN Charter) if it disregards these rights and

⁵⁵ Emphasis added.

⁵⁶ For discussion, with special emphasis on the Security Council, see Reinisch, ‘Developing Human Rights’, *supra* n. 36, 853 *et seq.*

freedoms when exercising jurisdiction over individuals. This author agrees with Professor Ian Brownlie, who has written as follows: 'Even if the political organs [of the United Nations] have a wide margin of appreciation in determining that they have competence by virtue of Chapter VI or Chapter VII, and further, in making dispositions to maintain or restore international peace and security, it does not follow that the selection of the modalities of implementation is unconstrained by legality. *Indeed when the rights of individuals are involved, the application of human rights standards is a legal necessity.* Human rights now form part of the concept of the international public order.'⁵⁷

In the absence of a specification of such rights and freedoms in the UN Charter itself, the Universal Declaration of Human Rights and the ICCPR serve, first and foremost, as relevant standards. When the Third Committee of the General Assembly considered the draft of the Universal Declaration in the Fall and Winter of 1948, the French delegate Professor René Cassin described the Declaration as 'an authoritative interpretation of the Charter of the United Nations' ('une explication autorisée de la Charte des Nations Unies').⁵⁸ The representative of Chile, Mr Santa Cruz, remarked that the Declaration 'merely stated, explicitly, rights granted by the Charter'. Violation by any State of the rights enumerated in the Declaration would mean violation of the principles of the United Nations.⁵⁹ A similar opinion was expressed by the representative of the Republic of China, Mr Chang, who said that the UN Charter committed all Member States to the observance of human rights, and that the Declaration stated those rights explicitly.⁶⁰ The Australian delegation also held that the Declaration represented a considerable advance towards a satisfactory definition of the 'fundamental human rights' referred to in the Charter.⁶¹ The delegate of Lebanon, Mr Azkoul, stated that no State could violate the principles of the Declaration without also violating the terms of the Charter. There already existed a place

⁵⁷ See I. Brownlie, 'The Decisions of Political Organs of the United Nations and the Rule of Law' in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1993), 91–102, 102.

⁵⁸ See United Nations, Official Records of the Third Session of the General Assembly, Part I, Third Committee, Summary Records of Meetings, 21 September–8 December 1948, 61. See also *ibid.*, 34: 'The French representative . . . considered the declaration of human rights to be a complement to the Charter of the United Nations which could not be included in it because of the lengthy preparation it required, a clarification of the Charter, and an organic act of the United Nations having all the legal validity of such an act.'

⁵⁹ *Ibid.*, 50. ⁶⁰ *Ibid.*, 47 *et seq.* ⁶¹ *Ibid.*, 55 (Mr Watt speaking for Australia).

in the Charter for a declaration of human rights. The implicit agreement concerning human rights, which was reflected in the Charter, was stated clearly in the Declaration.⁶²

Speaking for Lebanon before the plenary of the General Assembly on 9 December 1948, Mr Charles Malik, who as a member of the Human Rights Commission had been particularly influential in drafting the Universal Declaration, recalled that the members of the United Nations had already solemnly pledged themselves, under the Charter, to promote respect for human rights and fundamental freedoms, but that it was the first time that those rights and freedoms had been set forth in detail. A convention could subsequently be prepared, but it would rest on the rights laid down in that declaration.⁶³ Professor Cassin explained that the Declaration was a development of the Charter which had brought human rights within the scope of positive international law.⁶⁴ The delegate of Iceland, Mr Thors, said that his delegation regarded the Universal Declaration 'as a preamble to a future world constitution'.⁶⁵

As regards the present legal status of the Universal Declaration, it is important to note that the General Assembly expressly approved of it as one of the standards of the 'universal periodic review' mechanism of the Human Rights Council. Under the heading 'basis of the review', the Declaration is listed right behind the UN Charter and before 'human rights instruments to which a State is party'.⁶⁶

Accordingly, the Universal Declaration of Human Rights may well be counted among the 'constitutional by-laws' of the international community,⁶⁷ because it complements, and implements objectives of, the UN Charter.

In the practice of the United Nations, human rights obligations have been expressly recognised in two important areas. With regard to UN peace-keeping operations, the UN Secretary-General in 1999 promulgated 'fundamental principles and rules of international humanitarian law applicable to United Nations forces conducting operations under United Nations

⁶² *Ibid.*, 51.

⁶³ See United Nations, Official Records of the Third Session of the General Assembly, Part I, Plenary Meetings of the General Assembly, Summary Records of Meetings 21 September–12 December 1948, 857 *et seq.*, 860.

⁶⁴ *Ibid.*, 864 *et seq.*, 866. ⁶⁵ *Ibid.*, 877 *et seq.*

⁶⁶ See General Assembly res. 62/219 of 22 December 2007, endorsing Human Rights Council res. 5/1 of 18 June 2007 (with Annex 'United Nations Human Rights Council: Institution-Building, [Part] I: Universal Periodic Review Mechanism').

⁶⁷ For this notion, see Fassbender, *The United Nations Charter*, *supra* n. 48, 122 *et seq.*

command and control'.⁶⁸ In East Timor and Kosovo, respectively, the UN Transitional Administration in East Timor (UNTAET) and the UN Interim Administration in Kosovo (UNMIK) proclaimed the 'applicability' of human rights standards by stipulating that 'in exercising their functions, all persons undertaking public duties or holding public office [in the respective territories] shall observe internationally recognized human rights standards'.⁶⁹

The need for determining human rights standards to be observed by the Security Council depending on the circumstances of the case

From the foregoing it can be concluded that the UN Charter requires the Security Council, as indeed all organs of the United Nations, to observe 'human rights and fundamental freedoms' (Art. 1(3) of the Charter) as defined, in particular, in the Universal Declaration of Human Rights and the two International Covenants on Human Rights of 1966, when taking action which has a direct impact on individuals. However, this general finding is only the first step towards an effective compliance of the Council with its human rights obligations. The principle of a commitment to human rights must be translated into concrete terms – that is, applied to the circumstances of a particular case. First of all, it must be established which, and whose, human rights exactly could be negatively affected by an act or measure contemplated by the Council. Next, it is necessary to find out whether consideration of the various human rights at stake, and of the different groups of people being entitled to those rights, suggests one and the same course of action to be taken by the Council, or whether that consideration leads to contradictory

⁶⁸ See 'Observance by United Nations forces of international humanitarian law', Secretary-General's Bulletin, UN doc. ST/SGB/1999/13 of 6 August 1999, reprinted in *ILM*, 38 (1999), 1656–9. Cf. D. Shrags, 'UN Peacekeeping Operations. Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage', *AJIL*, 94 (2000), 406–12; and Wellens, *Remedies*, *supra* n. 7, 162–6. For an overview of the previous debate over the applicability of international humanitarian law to UN operations, see D. Shrags, 'The United Nations as an Actor Bound by International Humanitarian Law' in L. Condorelli *et al.* (eds.), *Les Nations Unies et le droit international humanitaire – The United Nations and International Humanitarian Law* (Paris: Editions Pédone, 1996), 317–38.

⁶⁹ See UNTAET, Reg. No. 1999/1, 'On the Authority of the Transitional Administration in East Timor', Doc. UNTAET/REG/1999/1 of 27 November 1999; UNMIK, Reg. No. 1999/1, 'On the Authority of the Interim Administration in Kosovo', Doc. UNMIK/REG/1999/1 of 25 July 1999. Cf. Mégret and Hoffmann, 'The UN as a Human Rights Violator?', *supra* n. 6, 333 *et seq.*

approaches. In the latter case, the Security Council needs to decide whether, in the particular circumstances, the protection of one particular human right is more important than that of another right. In other words, the Council must balance one human right against another, and possibly also the interests of one particular group of people against those of another group, an exercise with which national and regional human rights courts are familiar.

The Security Council must also weigh its human rights commitments against its Charter responsibility to maintain and restore international peace and security. That responsibility, with the express authority to use armed force to give effect to its decisions (Art. 42 of the Charter), entails, for instance, that the Council may refrain from observing the right to life or the right to physical integrity. The Council may also, for example, discriminate against persons on the grounds of their nationality when it imposes economic sanctions on a particular country and its citizens. When imposing sanctions on individuals in accordance with Chapter VII of the UN Charter, the Security Council must strive to discharge its principal duty to maintain or restore international peace and security while, at the same time, respecting the human rights and fundamental freedoms of targeted individuals to the greatest extent possible. There is a duty of the Council duly to balance the general and particular interests which are at stake. Every measure having a negative impact on human rights and freedoms of a particular group or category of persons must be necessary and proportionate to the aim the measure is meant to achieve.

To mention the example of due process rights of individuals directly affected by acts of the United Nations, the exact scope and intensity of those rights is not generally predefined. Depending on the circumstances of a particular situation, appropriate standards must be determined, suited to that situation, paying due regard to the nature of the affected rights and freedoms and the extent to which action taken by the United Nations is likely adversely to affect those rights and freedoms.⁷⁰ In the first place, such a determination of standards is the responsibility of the organ the action of which is directly affecting the rights and freedoms of individuals.

Occasionally it has been remarked that the Security Council is a political organ, and not a court. This is certainly true, but this qualification does not

⁷⁰ For a proposal on elements of due process rights of addressees of sanctions imposed on individuals under Chapter VII of the UN Charter, see Fassbender, 'Targeted Sanctions', *supra* n. 25, 476 *et seq.* See also Security Council res. 1904 of 17 December 2009 (establishing an Office of the Ombudsperson as a part of the Al Qaeda/Taliban sanctions regime).

exempt the Council from its human rights obligations which arise from the UN Charter. The governments of Member States are also political organs, but no one would deny that they are nevertheless obliged to respect the international human rights commitments accepted by their States. In the same way as governments, the members of the Security Council can seek legal advice. However, an aspect which must be taken into consideration is that, in certain circumstances, the Council must act very swiftly in order to carry out its mandate as defined by the UN Charter. If rapid action is necessary – for instance, to ward off an imminent act of aggression – one cannot expect the Council to be as circumspect and attentive to possible adverse human rights consequences – as, for example, in the case of legislative acts, the drafting of which takes many months.

There can be no doubt about the outstanding importance of human rights in the contemporary international legal order, and about the necessity of a Security Council strictly adhering to those rights. But it would be a mistake to create the impression of a general contradiction between the protection of human rights and effective action by the Security Council, as this could jeopardise the role the Council has come to play in world affairs in the last two decades. The world still requires an exercise of more, not less authority on a global level; and international lawyers should encourage this development rather than warn against it.⁷¹

⁷¹ See B. Fassbender, 'Quis judicabit? The Security Council, Its Powers and Its Legal Control', *EJIL*, 11 (2000), 219–32, 220.